Supreme Court U.S.
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No. 02-971

IN THE

Supreme Court of the United States

HOMAN MCFARLING,

Petitioner,

v.

MONSANTO COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court in Missouri lacked personal jurisdiction over petitioner, a Mississippi resident, even though petitioner and respondent entered into a contract containing a forum-selection clause, which both lower courts held to be valid, in which the parties consented to be sued in courts in Missouri on any claim arising out of the contract.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those identified in the caption.

RULE 29.6 STATEMENT

Monsanto has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-30) is reported at 302 F.3d 1291. The decision of the district court (Pet. App. 33-35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2002. Pet. App. 1. A petition for rehearing was denied on October 16, 2002. Pet. App. 31. The petition for a writ of certiorari was filed on December 27, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. This is a patent-infringement and contract dispute in which respondent Monsanto has alleged that petitioner

McFarling infringed Monsanto's patents covering genetically modified plants and plant seeds that are resistant to certain herbicides, and breached a contract in which petitioner agreed to terms accompanying the sale of these herbicide-resistant plant seeds.

The active ingredient contained in Monsanto's Roundup® herbicide, glyphosate, is highly effective at destroying most forms of noxious weeds, but can also cause severe damage to crop plants. After a considerable investment of resources, Monsanto developed recombinant DNA technology that, when inserted into certain crop seed (including soybeans), protects the crop plants from glyphosate. This biotechnology permits farmers to spray Roundup® herbicide over an entire field without fear of harm to their crops. Monsanto claimed this technology—(1) the glyphosate-tolerant plants; (2) the genetically modified seeds for such plants; (3) the specific modified genes; and (4) the method of producing the genetically modified plants—as United States Patents Nos. 5,633,435 and 5,352,605. Monsanto licenses biotechnology claimed in these and other patents as Roundup Ready® seed. *See* Pet. App. 2.

Monsanto authorized companies to manufacture the patented herbicide-resistant seeds, which are then sold to farmers. Monsanto requires purchasers of the patented seeds to obtain a limited-use license covering use of those seeds. One method of obtaining such a limited-use license is by signing a Technology Agreement with Monsanto. This Technology Agreement provides that the seeds are to be used "for planting a commercial crop only in a single season," and expressly directs the licensee not to "save any crop produced from this seed for replanting, or supply saved seeds to anyone for replanting." Pet. App. 3.

Just above the signature line of the Technology Agreement is the following statement: "I acknowledge that I have read and understand the terms and conditions of this Agreement and that I agree to them." All of the terms and condi-

tions of the Technology Agreement, including the prohibition against saving seed, were printed on the obverse side of the Agreement, a two-sided document. Also on the obverse side was the following forum-selection clause, printed in capital letters:

> THIS AGREEMENT IS GOVERNED BY THE LAWS OF THE STATE OF MISSOURI AND THE UNITED STATES (OTHER THAN THE CHOICE OF LAW RULES). THE PARTIES CONSENT TO THE EXCLUSIVE JURISDICTION OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, AND THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, STATE OF MISSOURI, FOR ALL DISPUTES ARISING UNDER THIS AGREEMENT.

Pet. App. 3-4. This forum-selection clause was the only provision printed in capital letters in the Technology Agreement. *Id.* at 4.

Petitioner McFarling, who resides in Mississippi, obtained a license in 1998 to plant Roundup Ready® soybean seed as a commercial crop. Petitioner signed the 1998 Technology Agreement when he purchased that seed. Petitioner has conceded, however, that, contrary to the express terms of the Agreement, he saved 1,500 bushels of the patented Roundup Ready® soybeans from his 1998 harvest and replanted them the following season—without paying a "license fee for this saved soybean seed, which retained the genetic modifications of the Roundup Ready® seed." Pet. App. 3. He repeated that activity in the following growing season, and stated that he intended to plant soybeans saved from the 2000 harvest in 2001, as well. *Ibid.*

2. Monsanto filed suit against petitioner in the United States District Court for the Eastern District of Missouri, as provided for in the forum-selection clause of the Technology Agreement. Monsanto alleged that petitioner had infringed

its patents covering the Roundup Ready® seed and breached the terms of the Technology Agreement, and sought a preliminary injunction against further infringement of its patents. Petitioner moved to dismiss for lack of personal jurisdiction, and raised various counterclaims and defenses, charging Monsanto with patent misuse and violation of the antitrust laws and the Plant Variety Protection Act (PVPA), 7 U.S.C. §§ 2321 *et seq.* *See* Pet. App. 3-4.

The district court held an evidentiary hearing on petitioner's motion to dismiss for lack of personal jurisdiction. Petitioner admitted under oath that he had voluntarily signed his name to the 1998 Technology Agreement. C.A. App. 72. Although petitioner "didn't take the time" to read the Technology Agreement in full, *id.* at 65, he agreed that he "had the opportunity to look at . . . all of the provisions" and that no one "precluded [him] from reading the document," *id.* at 72-73. Petitioner also stated that he participated in the "Technology Value Package"—also identified on the obverse side of the Technology Agreement[1]—and received credit from Monsanto in 1999 for soybean seeds that had washed away by a flood. *Id.* at 62, 76-77.

Reasoning that "[petitioner's] claim that he did not read the agreement before signing it does not change the validity of the contract," the district court held that the Technology Agreement "is a valid consent to personal jurisdiction and venue." Pet. App. 34. After another full evidentiary hearing, C.A. App. 206-465, the district court subsequently granted Monsanto's motion for a preliminary injunction, holding that "nothing here convinces me that [petitioner] is likely to succeed on the merits" of his counterclaims and defenses, *id.* at 474.

3. Petitioner appealed both decisions to the court of appeals, which affirmed. Pet. App. 1-30. As pertinent here, the

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[1] By completing the Technology Agreement, petitioner was "automatically enrolled in the Technology Value Package." C.A. App. 23A.

court of appeals agreed with the district court that, by signing the Technology Agreement, including the forum-selection clause, petitioner had voluntarily consented to the exercise of personal jurisdiction by courts in Missouri, and that petitioner had not demonstrated that the forum-selection clause was invalid or that its enforcement would be somehow unreasonable or unjust. *Id.* at 5-8. In response to the dissent of Judge Clevenger, who would have held the forum-selection clause in the Technology Agreement to be an unenforceable contract of adhesion, *id.* at 16-30, the court of appeals stated:

> If the term "contract of adhesion" is understood to mean a contract that a court decides is unenforceable because it is unconscionable, then obviously no such contracts will be enforced. If, on the other hand, the term refers to form contracts that are not subject to negotiation, forum selection clauses in such contracts have often been enforced.

Id. at 8 n.3. On the merits of the preliminary injunction, the court of appeals held that petitioner had failed to establish a likelihood of success on his counterclaims and defenses that the use restriction violated the antitrust laws, the "first sale" doctrine of exhaustion, or the PVPA, or otherwise constituted patent misuse. *Id.* at 9-16.[2]

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[2] In this Court, petitioner has not renewed his contention that the district court erred on the merits in entering a preliminary injunction. As petitioner notes (Pet. 4 n.4), after the court of appeals' decision in this case, the district court entered a money judgment against him on one count of Monsanto's complaint (the contract claim alleging breach of the 1998 Technology Agreement). The district court certified that judgment as a final judgment for immediate appeal under Federal Rule of Civil Procedure 54(b), and petitioner has filed a notice of appeal from that judgment. *See Monsanto Co.* v. *McFarling*, No. 4:00CV84-CDP (E.D. Mo. Nov. 15, 2002). That money judgment reflects the amount set forth in the liquidated-damages clause of the 1998 Technology Agreement: the amount of the technology fee per bag of soybean seed, multiplied by the number of bags of seed purchased, in turn multiplied by 120. *See* 11/5/2002 Tr. 52-53, *Monsanto Co.* v. *McFarling*, No. 4:00-CV-84-CDP (E.D. Mo.). The district court rejected an alternative formulation of dam-

ARGUMENT

The court of appeals correctly held in this case that (a) a court's exercise of personal jurisdiction over a defendant is consistent with due process when that defendant has consented to be sued in that forum in a valid forum-selection clause, and (b) the particular forum-selection clause at issue here is valid. Both aspects of the court of appeals' ruling are entirely consistent with this Court's decisions on personal jurisdiction and forum-selection clauses, and neither aspect conflicts with any decision of any other court of appeals. The validity of the specific forum-selection clause at issue in this case, moreover, is a factbound issue not warranting this Court's review. Certiorari should therefore be denied.

1. Petitioner first contends (Pet. 5-8) that he did not actually read the forum-selection clause in his Technology Agreement with Monsanto, and so he should not be deemed to have waived any objection based in the Due Process Clause to the exercise of personal jurisdiction over him by a federal court sitting in Missouri. Petitioner seeks to invoke the principle that the courts ordinarily will not find a waiver of a constitutional right in the absence of an "intentional relinquishment of a known right or privilege." *See Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Petitioner argues that the record does not affirmatively show that he knowingly waived his right not to be required to defend against litigation in Missouri, and so, he maintains, the district court's exercise of personal jurisdiction over him in this case violates due process.

There is no support for petitioner's argument that the validity of a court's exercise of personal jurisdiction over a defendant in a civil case is governed by the rule of *Johnson* v. *Zerbst*. This Court has never suggested that the Due Process Clause prevents a court from exercising personal jurisdiction unless the defendant intentionally and expressly waives any

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ages proffered by Monsanto, which might have resulted in a higher calculation of contract damages. *See id.* at 53-55.

objections to such jurisdiction. The Court has observed, in fact, that "[a] variety of legal arrangements have been taken to represent express *or implied* consent to the personal jurisdiction of the court." *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (emphasis added) (citation omitted).[3]

It is well settled that a defendant may forfeit any objection to personal jurisdiction based in the Due Process Clause by failing to raise that objection at the earliest possible point during litigation. Thus, Federal Rule of Civil Procedure 12(h) provides that "[a] defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion under [Rule 12] nor included in a responsive pleading . . . ." Fed. R. Civ. P. 12(h).[4] The Court has also upheld provisions for constructive consent to personal jurisdiction based on the actions, rather than the express waiver, of the defendant. *See Adam* v. *Saenger*, 303 U.S. 59, 67-68 (1938). Indeed, the entire "minimum contacts" theory of personal jurisdiction rests on the understanding that a court may exercise jurisdiction over a defendant based on its conduct, as well as its express consent to jurisdiction. *See Burger King Corp.* v. *Rudziewicz*, 471 U.S. 462, 473-74 (1985).

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[3] None of the cases from this Court and the courts of appeals on which petitioner relies (Pet. 5-7) in arguing for the *Johnson* v. *Zerbst* standard involved personal jurisdiction at all, with the exception of *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972). In that case, the Court stated only that, "[e]ven if, for present purposes, we assume" that the *Johnson* v. *Zerbst* standard applied in the context of personal jurisdiction, that standard was satisfied on the facts of the case before it. *Id.* at 185-86. The Court did not *hold* that the *Johnson* v. *Zerbst* standard governs personal jurisdiction issues, as petitioner suggests. *See Fuentes* v. *Shevin*, 407 U.S. 67, 94-95 (1972) (noting that *Overmyer* did "not hold[] that such standards must necessarily apply").

[4] Lower courts routinely hold that a defendant to civil litigation loses the right to object to the exercise of personal jurisdiction if that objection is not raised at the earliest opportunity. *See, e.g.*, *Uffner* v. *La Reunion Française, S.A.*, 244 F.3d 38, 41 (1st Cir. 2001); *Hamilton* v. *Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999).

Thus, although Monsanto maintains that petitioner did knowingly and intentionally waive any objection to the exercise of personal jurisdiction in Missouri when he signed the Technology Agreement, that argument is not essential to sustain the district court's exercise of jurisdiction in this case. It is sufficient that petitioner signed a contract with Monsanto that contained a forum-selection clause, and that the forum-selection clause is not unenforceable on the ground that it is unreasonable, oppressive, or unfair. "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court . . . ." *National Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315-16 (1964).

The validity of such a forum-selection provision is a straightforward matter of contract law. One foundational principle of contract law, as the court of appeals noted, is that, absent a claim of fraud, duress, or unconscionability, one who has signed a contract will not be heard to argue that he is not bound by a provision of that contract merely because he failed to read it.[5] *See* Pet. App. 7 ("A party who signs an agreement is bound by its terms, unless he was fraudulently induced not to read it or was fraudulently misled as to its content or significance."). Petitioner does not claim that he was misled or fraudulently induced to sign the Technology Agreement, including the forum-selection clause, and no such claim could plausibly be made in this case.

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[5] As the court of appeals also noted (Pet. App. 8), both Missouri and Mississippi follow this universal rule. *See State ex rel. St. Louis Car Co.* v. *Hughes*, 152 S.W.2d 193, 197 (Mo. 1941) ("The general rule is that a person who is sui juris, in full possession of his faculties, able to, and with ample opportunity to read, and who intentionally signs a paper, is, in the absence of fraud or mistake, conclusively presumed to know its contents and cannot be heard to say that it did not express the real contract."); *Continental Jewelry Co.* v. *Joseph*, 105 So. 639, 639 (Miss. 1925) ("A person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him, and that he supposed its terms were different, unless he was induced not to read it or have it read to him by fraudulent representations made to him by the other party, on which he was entitled to rely.").

Petitioner further argues (Pet. 8-10) that the Missouri district court lacked personal jurisdiction over him because he did not "intentionally direct" (Pet. 8) some activity towards that forum. But that "intentional direction" (or "purposeful availment") standard for personal jurisdiction, which is one method of determining whether a party has established "minimum contacts" with a forum (*see Burger King*, 471 U.S. at 475), is irrelevant to this case, in which personal jurisdiction rests on the defendant's *consent*, given by the execution of a contract containing the forum-selection clause, to jurisdiction in a Missouri forum. "Minimum contacts" and express consent are two independent bases on which a court may exercise personal jurisdiction over a defendant *See id.* at 472 (noting that "purposeful availment" standard applies "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented to suit there*") (emphasis added) (footnote omitted). Each is a subset of the overarching principle that a forum may exercise personal jurisdiction over an out-of-state defendant when to do so would comport with "fair play and substantial justice." *Id.* at 476 (internal quotation marks and citation omitted). When a party, such as petitioner McFarling, voluntarily enters into a contract from which he obtains benefits, and expressly agrees in that contract to be amenable to suit in a particular forum in a controversy arising out of that contract, it is not fundamentally unfair to require him to live up to that part of the bargain.

2. Petitioner maintains that the court of appeals erroneously ruled that all forum-selection clauses are *per se* valid. *See* Pet. 11. The court of appeals made no such ruling, however. The court stated, rather, that a forum-selection clause "is enforceable *unless* the party challenging it clearly demonstrates that it is invalid or that enforcement would be unreasonable and unjust." Pet. App. 5 (emphasis added). The court also noted (in response to the dissent's assertion that the forum-selection clause at issue here was a "contract of adhesion") that "[i]f the term 'contract of adhesion' is under-

stood to mean a contract that a court decides is unenforceable because it is unconscionable, then obviously no such contracts will be enforced." *Id.* at 8 n.3. The court of appeals thus heeded this Court's cautionary statement in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 595 (1991)—where the Court upheld a forum-selection clause—that such clauses "are subject to judicial scrutiny for fundamental fairness." The court then exercised that judicial scrutiny and ruled that the clause at issue in this particular case is valid and enforceable (Pet. App. 7-8)—a fact-bound ruling that does not warrant this Court's review.

The court of appeals' analysis of the enforceability of the forum-selection clause was correct. Forum-selection clauses are "prima facie valid," *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972), and a party challenging such a clause must make "a strong showing" that it is "unreasonable or unjust," or was procured by "fraud or overreaching," *id.* at 15. No such showing was or could be made in this case. Although petitioner maintains that he lacked actual notice of the forum-selection provision in the Technology Agreement (Pet. 11), in fact nothing in the record suggests that petitioner was not provided with *notice* of that clause—which was the only clause in the contract printed in capital letters and was grouped with all the other terms and conditions of the agreement. *See* Pet. App. 4. Petitioner may have failed to read the forum-selection clause, but that failure does not amount to lack of notice.

In *Carnival Cruise Lines*, this Court sustained the enforceability of a forum-selection clause in a commercial cruise ticket, where the "the terms . . . [were] not subject to negotiation" and the "individual purchasing the ticket [did] not have bargaining parity with the cruise line." 499 U.S. at 593. In that case, two residents of the State of Washington purchased from Carnival Cruise Lines, headquartered in Florida, a ticket for a seven-day cruise departing from Los Angeles. *See id.* at 587-88. After they "paid the fare," the passengers received their tickets, which instructed them to read the

tickets' 25 terms and conditions, the eighth of which was a forum-selection clause in small print designating Florida as the exclusive jurisdiction for "all disputes and matters whatsoever arising under . . . this Contract." *Ibid.* This Court upheld this "form ticket contract," noting that Carnival, which carries passengers from many locales, had an interest in limiting the fora in which it could be subject to suit; that forum-selection clauses spare litigants the time and expense of pretrial motions to determine the correct forum and conserve judicial resources that would otherwise be devoted to deciding those motions; that passengers benefit from the savings Carnival realizes by limiting the fora in which it may be sued; that Florida, Carnival's principal place of business, was not a remote alien forum; and that the passengers retained the option of rejecting the contract. *See id.* at 593-95. This Court expressly rejected the argument that "a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining." *Id.* at 593.

The court of appeals' decision in this case, upholding the validity of the Technology Agreement's forum-selection clause, follows naturally from *Carnival Cruise Lines*. Monsanto licenses its Roundup Ready® seed to farmers all over the country, and has a strong and justifiable interest in not having to pursue claims of breach of the Technology Agreement (or license) in several different fora. *Cf. Carnival Cruise Lines*, 499 U.S. at 593. Given the potential number of lawsuits arising out of these Technology Agreements, the forum-selection clause has the salutary effect of dispelling any confusion about where such suits must be brought and defended, saving *both* parties the cost of litigating the issue of personal jurisdiction. *Cf. id.* at 593-94. Monsanto's law-abiding customers benefit from such savings, which can either be passed along in terms of lower prices or put towards further research and development. *Cf. id.* at 594. Judicial efficiency and uniformity are enhanced by placing all legal and factual disputes arising out of these patent licenses in a

single jurisdiction, and Missouri, which is Monsanto's principal place of business, is not a remote alien forum. *Cf. ibid.* And petitioner, who voluntarily signed his name beneath a provision stating that he had read and understood the terms and conditions of the agreement, was reasonably put on notice of the forum-selection clause and was free to reject the Technology Agreement with impunity. *Cf. id.* at 595. The court of appeals thus had ample basis for its conclusion that petitioner "has failed to demonstrate that the choice of Missouri as the forum is unreasonable." Pet. App. 7-8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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